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SUBJECT: COURT QUASHES SECURITY CERTIFICATE, FOUR REMAIN

REF: 08 OTTAWA 360

¶11. (SBU) Summary: On September 24, the Federal Court of Canada announced it will quash an immigration security certificate against Moroccan-born Adil Charkaoui, reducing the number of active certificates in suspected terrorist cases to four. The decision is the latest setback for the government in a series of legal rulings against the controversial process. Though the government has indicated it may appeal, the ruling raises doubts about the government's ability to uphold the remaining cases and leaves Canada with fewer options to remove non-citizens deemed a danger. End summary

CHARKAOUT FREE, BUT CERTIFICATE IN PLACE - FOR NOW

¶12. (U) Only a few hours into a scheduled two-day hearing into the ongoing security certificate case against Moroccan-born Adil Charkaoui on September 24, a Federal Court judge announced that she would issue an order by that day's close of business to revoke all bail conditions against the defendant. The judge also signaled her intent to quash Charkaoui's security certificate entirely. She postponed an official ruling on the latter until she has heard legal arguments in a closed-door hearing the week of September 28. However, she declared that the "certificate will fall," and noted that "how, is the question." Until those legal arguments wrap up, the security certificate remains valid.

¶13. (U) In use since 1978, the security certificate system allows the government to detain and deport non-citizens, both permanent residents and foreign nationals, whom the government deems inadmissible to Canada under security-related provisions of the Immigration and Refugee Protection Act, including those related to terrorism, serious and organized crime, or human rights violations.

¶14. (U) Canadian authorities arrested Charkaoui on a security certificate in 2003 on suspicion of links with al-Qaeda and had released him conditionally in 2005. The Federal Court had substantially relaxed his bail conditions on February 20, but still required him to wear an electronic monitoring device, prohibited contact with specific people, and denied him access to a passport. In August, the Canadian Security Intelligence Service (CSIS) withdrew most of the wiretap evidence and human source evidence rather than comply with the Court's March order to disclose the sources of confidential information against him. Federal lawyers argued that the disclosure of information against Charkaoui would be "injurious to national security," compromise CSIS' ability to investigate security threats, and force the agency to reveal its confidential sources. It admitted that its remaining evidence was too weak to support a security certificate against him.

¶15. (U) When the certificate hearing resumed on September 24, federal lawyers asked the Court to continue restrictions on Charkaoui until higher courts clarify what sensitive information may be disclosed in court. CSIS contended that its sensitive information against Charkaoui remains accurate. However, the judge ruled that the government had failed to meet its burden of proof. CSIS signaled

that it may consider an appeal. For his part, Charkaoui stated that he wants an official apology and will decide later whether to launch a lawsuit against the federal government.

SECURITY CERTIFICATES SYSTEM

16. (U) Canada has issued thirty-three security certificates (including five re-issued in February 2008 after revisions to the immigration law) since 1978 to detain and remove non-citizens who pose a threat to national security. [Note: the government has not issued any new certificates since 2006.] The government issues the certificates on the basis of confidential evidence and a warrant signed by two cabinet ministers, subject to review by the Federal Court. The government does not have to disclose the secret evidence to the defendant. In response to a 2007 ruling by the Supreme Court of Canada, Parliament passed amended legislation in February 2008 to provide access to security-cleared lawyers ("special advocates") to examine and challenge confidential evidence on the defendants' behalf, to prohibit use of evidence that may have been obtained through torture, and to expand mechanisms for review and appeal, to better balance national security with civil rights.

FOUR OTHER CASES BEFORE THE COURTS

17. (U) In addition to the Charkaoui case, the government has four other security certificates before the courts. Courts released all four individuals with conditions, but one voluntarily returned to custody in March after failing to convince a judge to relax his bail conditions. The remaining certificate cases are:

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-- Algerian-born Mohamed Harkat; Canadian authorities allege that Harkat is an al-Qaeda sleeper agent and detained him, pending deportation, in 2002. Authorities released him in 2006 on strict conditions. In June, the Federal Court temporarily suspended hearings in his case after CSIS acknowledged that it did not inform the Federal Court that a key informant against him had failed polygraph tests in 2002. On September 21, a Federal Court judge significantly eased bail conditions on Harkat, ordering Canada Border Services Agency (CBSA) to cease monitoring Harkat's mail and other communications, and lifting his 24-hour surveillance by the Canadian Border Services Agency (CBSA). It also relaxed restrictions on his excursions outside the home and screening of visitors.

Harkat was given permission to use computers and land-line telephones, but not the internet or cell phones. He must report to authorities weekly, continue to wear a GPS ankle-monitoring device, obtain permission to travel outside the Ottawa area, and does not have access to a passport. Harkat's next public court hearing is September 30. The Court will hold in camera hearings in November, with further public sessions scheduled in January through April, at which his lawyers said they will press for the lifting of all remaining restrictions. The government conceded in the most recent hearing that the passage of time and Harkat's high public profile have reduced any threat he may have posed to national security.

-- Egyptian-born Mahmoud Jaballah; Canadian authorities first detained him on a security certificate in 1999, but the Federal Court threw out the case. Authorities arrested him on a second certificate in 2001, alleging that he was a member of Al Jihad, and released him conditionally in 2007. The Federal Court last reviewed his case on September 10.

-- Syrian-born Hassan Almrei; Canadian authorities contend that he participated in an international forgery ring with ties to al-Qaeda. Authorities arrested and detained Almrei in 2001, and conditionally released him in January 2009. The Federal Court last reviewed his case on September 14.

-- Egyptian-born Mohamed Zeki Mahjoub; Canadian authorities contend

that Mahjoub was a member of the Egyptian Vanguards of the Conquest. Authorities arrested him in 2000 and released him conditionally in 2007, although he voluntarily returned to custody on March 18.

¶ 8. (SBU) Comment: The collapse of the government's case against Charkaoui sets an important precedent for the remaining four certificate cases. The controversial process has for some time been producing diminishing returns for the government. If the security certificate regime collapses from the weight of repeated judicial setbacks, the government will be left with fewer options to remove non-citizens deemed a danger to Canada.

HOPPER